

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000246-001 DT

08/18/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

RANDON L MILLER (001)

DENNIS I WILENCHIK

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M-0751-CR-2014-000738.

Defendant-Appellant Randon Lee Miller (Defendant) was convicted in Scottsdale Municipal Court of Disorderly Conduct, Failure To Obey a Police Officer, and Resisting Arrest. Defendant contends his convictions are the result of outrageous government conduct. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On January 10, 2014, Defendant was charged by Complaint with Count 1, Interfering With Judicial Proceedings, A.R.S. § 13-2810(A)(2); Count 2, Disorderly Conduct, A.R.S. § 13-2904(A)(1); Count 3, Failure To Obey a Police Officer, S.C.C. § 19-13; Count 4, Assault, A.R.S. § 13-1203(A)(2); and Count 5, Resisting Arrest, A.R.S. § 13-2508(A)(3). Prior to and during trial, Defendant never made any claim with the trial court that his prosecution in this matter was the result of outrageous government conduct. After a bench trial that began on October 27, 2014, the trial court found Defendant guilty of Disorderly Conduct, Failure To Obey a Police Officer, and Resisting Arrest, and not guilty of Interfering With Judicial Proceedings and Assault. (R.T. of Oct. 28, 2014, at 508-11.) The trial court then imposed sentence. (*Id.* at 518-19.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12-124(A).

**II. ISSUE: HAS DEFENDANT WAIVED ANY CLAIM OF OUTRAGEOUS GOVERNMENT CONDUCT
BY NOT FIRST PRESENTING THAT ISSUE TO THE TRIAL COURT.**

Defendant contends his convictions are the result of outrageous government conduct. Absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error (1) is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and (2) places the burden on the defendant to show both that error existed and

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000246-001 DT

08/18/2015

that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). Further, it is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one. *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996); *State v. West*, 176 Ariz. 432, 440–41, 862 P.2d 192, 200–01 (1993); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988).

In the present matter, Defendant did not present to the trial court a claim of outrageous government conduct. This is a fact intensive issue, and because Defendant did not make this claim with the trial court, there was no reason for the officers to give details why they engaged in the conduct they did. This Court therefore concludes it is particularly inappropriate to consider this issue for the first time on appeal.

In Appellant's Memorandum, Defendant's attorney argues why the proceedings resulted in error, but does not argue why any error was fundamental. At oral argument, Defendant's attorney did argue why any error was fundamental, but appellate courts typically do not consider argument made for the first time at oral argument.

Finally, this Court notes Defendant was charged in Scottsdale Municipal Court in Cause Number M-0751-CR-2013-000773, and in that case, on January 24, 2014, Defendant's attorney filed a Motion To Dismiss "for lack of probable cause and pursuant to the due process clause for outrageous governmental conduct." Defendant's attorney in that case was the same attorney that represented Defendant in the present case. Because that attorney filed a motion to dismiss in that case based on a claim of outrageous governmental conduct, but did not file any such motion or otherwise raise that issue with the trial court in the present case, it appears that attorney made a conscious decision not to raise that issue in the present case. Moreover, this Court has concluded there was no outrageous governmental conduct in that other case. *State v. Randon Lee Miller*, LC-2015-000086 (Ariz. Super. Ct. Jun. 12, 2015).

III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant has waived any claim of outrageous government conduct by not first presenting that issue to the trial court.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

081820151500•

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.